Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act Of 1996	)	CC Docket No. 96-98
Inter-Carrier Compensation for ISP-Bound Traffic	)	CC Docket No. 99-68

COMMENTS OF THE STATE MEMBERS
OF THE
CC DOCKET 80-286 FEDERAL-STATE JOINT BOARD ON SEPARATIONS

The State Members of the CC Docket No. 80-286 Joint Board on Separations ("Members") file these comments in response to certain aspects of the Federal Communications Commission ("FCC") Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68[1] regarding the jurisdictional treatment of Internet Service Provider ("ISP")-bound traffic. Members respectfully request any waivers needed to file these comments out-of-time.

INTRODUCTION

The members believe that the direction articulated by the FCC in this proceeding may have unintended and unanticipated consequences for the interpretation of certain separations rules. Moreover, the jurisdictional impacts of this and other related decisions may require changes to Part

[1] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98 and Inter-carrier Compensation for ISP-Bound Traffic, CC Docket No. 99-68,

36 rules through the Joint Board process in CC Docket No. 80-286. Finally, ignoring the action by some local exchange companies[2] could lead to increased incidences of unilateral action by other parties to the separations process, including the states. The action taken by the FCC may require changes to the jurisdictional cost allocations contained in Part 36[3] to more accurately reflect the increased regulatory authority asserted by the FCC over Internet-related traffic. In particular, the portion of loop allocated currently to the interstate jurisdiction may have to be increased to reflect the increased authority of the Commission over 'local service' through the dismissal of the two call approach for dial up Internet services.[4]

IMPLICATIONS

The Members believe that there are clear separations-related implications of the FCC's decision in this proceeding.

First, the assertion by the Commission of its immediate jurisdiction over the local services used to deliver ISP-bound traffic implicates a basic Part 36 principle that costs and revenues follow a jurisdictional determination, i.e., costs and revenues associated with interstate service flow to the interstate jurisdiction under Part 36. The costs and revenues associated with this "interstate" service, however, continue to be assigned to the intrastate jurisdiction. To restore consistency, the

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FCC 99-38 (February 26, 1999).

2 ***CITE THE LETTER BY SBC.***

3 47 CFR Section 36.1 et seq.

4 This most recent action by the Commission is the culmination of a number of separate decisions that are of concern to the Members. We are concerned about each of these separate items. First, in the BellSouth Memory Call case, In re: the Matter of Petition for Emergency Relief and Declaratory Ruling Filed by the Bell South Corporation, 7 FCC Rcd 1619; 1992 FCC Lexis 2915; 70 Rad. Reg. 2d (P&F) 584 FCC 92-18 (February 14, 1992), the FCC expands its jurisdiction by dictating the terms and conditions for an intrastate service. Second, in the decision at issue here, the FCC again expands its jurisdiction by dictating the terms and conditions of an intrastate service, namely, determining from which intrastate tariff a specific interstate service must be purchased. Third, under the recent Supreme Court decision in AT&T v Iowa Utilities Board, 119 S.Ct. 721 (1999), reversing in part, affirming in part, and remanding, Iowa Utilities Bd. v FCC, 120 F.3d 753 (8th Cir. 1997) (Eighth Circuit Docket No. 96-3321 & Consolidated Cases), the FCC has the authority to determine rate making methodology for establishing rates for intrastate unbundled network elements. Each of these decisions relieves states of authority to set

investment and expense associated with all interstate services, including these ISP-related "interstate" services, should be allocated to the interstate jurisdiction. The Federal-State Joint Board on Separations should promptly address changes to the Part 36 rules that are needed to avoid an inappropriate mismatch of jurisdictional allocations. The Joint Board should also clarify the Part 36 implications of jurisdictional shifts that would result from the FCC's one-call analysis if applied to other situations, e.g., voice messaging, call-forwarding, three-way calling, and intrastate calls connecting to private interstate networks.

The tension between paragraphs 20 and 36 of the Commission's February 26, 1999, Order, creates analogous tension for separations. By concluding that certain services are jurisdictionally interstate but are to be treated as intrastate for separations purposes, the FCC may have opened a door that could create unnecessary jurisdictional cost allocation questions and inconsistencies.

DISCUSSION

The sole purpose of jurisdictional separations is to determine the precise scope of the FCC's and state regulator's jurisdiction to prevent confiscation and double recovery of a regulated common carrier's assets and expenses. Jurisdictional separations strives to match regulatory authority (i.e., determination of terms and conditions as well as rate levels) with regulatory responsibility (i.e., jurisdictional cost recovery). Whichever jurisdiction is responsible for setting the rates to recover the allocated costs must ensure that their overall rate structure is not confiscatory. Through Part 36, each jurisdiction is allocated their costs, e.g., investments, expenses and reserves, to design rates that minimize the risk of confiscation and double recovery.

Two regulatory authorities have historically been responsible, both from a rate-making and cost recovery perspective, for certain distinct services, even though many of these services

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rates, but none expressly shifts responsibility for the cost of providing these services away from the states.

used the same facilities. For example, the FCC has been solely responsible for cost recovery and rate setting for interstate toll services, while state commissions have been solely responsible for cost recovery and setting rates for local service, even though both of these separately regulated services use the same facilities.

Prior to the FCC's "one-call" interpretation, a particular service was only regulated by a single regulator, either the FCC or state commission, even though the particular service may use facilities that are used by other services, interstate or intrastate. As a result of this single jurisdiction of a service, it was reasonable that all of the costs and revenues associated with this service would be in the same single jurisdiction. With the FCC's "one-call" interpretation, services are no longer regulated by a single jurisdiction, i.e. the FCC has dictated the terms and conditions for an intrastate service (see footnote 4). So long as a single jurisdiction has sole authority or jurisdiction over a particular service, it also had sole responsibility for the recovery of the "separated" costs associated with that service.

The Commission's February 26, 1999 Order appears to contradict the single jurisdiction premise underlying the current Part 36 allocation of costs and revenues by breaking the link between jurisdictional authority and responsibility: the FCC exerts its jurisdictional authority but accepts no jurisdictional responsibility.

Traffic bound for an ISP via a local call is a service which is included in the definition of universal service. As such, it is afforded additional consideration in the Communications Act, Section 254(k), that prohibits an unreasonable allocation of the costs of common and joint facilities to this service. Despite this, the Commission decided that the common and joint costs of this now interstate service, should remain in the intrastate jurisdiction. The unavoidable result is that at least a portion of the common and joint costs associated with this "interstate" service is being allocated to local service. It would appear that any allocation of common and joint costs associated with any interstate services to any intrastate service included in the definition of universal service, i.e., local service, is a *prima facie* violation of the Act.

As a result of the decision to assert jurisdiction over ISP-bound traffic, the FCC should accept its reasonable share of costs otherwise associated with local service. Such recognition should be accomplished by an increased allocation of costs per Part 36.

The absence of a clear recognition in Part 36 of the jurisdictional shift has led to a variety of ad hoc and often inconsistent ways of dealing with costs. Some carriers unilaterally assign dial-up Internet minutes to the interstate jurisdiction. Other ILECs use less direct ways, such as not updating studies, ignoring internet minutes, and allocating internet minutes based on all other minutes. While these reinterpretations of separations rules address a portion of the associated costs, they do not address them all. For example, these methods do not provide for an increase in interstate allocation of costs associated with the local loop, nor do they address any costs that are not allocated on the basis of minutes, e.g., marketing expense. While the reinterpretations do not seem to require a Part 36 rule change, addressing all of the associated costs, e.g., loop costs, would require a change in the Part 36 rules by the Joint Board.

The Commission should recall that changes in separations results - and thus cost shifts between federal and state jurisdictions - can be achieved even without a Joint Board recommendation. One approach is to interpret and apply the rules differently. One example of interpretation of the rules was the use, until 1988, of five day traffic studies instead of the seven day traffic studies. Even though there were clear jurisdictional differences in the two methods, the five-day methodology was uniformly implemented. This uniform interpretation argument withstood numerous unilateral attempts by state commissions to "pick and choose" a seven day methodology, with its higher allocation to interstate. The lack of uniformity in treating the ISP-bound minutes, however, and the lack of regulatory intervention to restore uniformity, suggests that a "pick and choose" approach might now be viewed as acceptable.

If uniformity is no longer enforced, and ILECs, state commissions and the Commission each adopt their own interpretations, the underlying objective of ensuring that the sum of the costs assigned to the two jurisdictions equals total ILEC cost (neither too much nor too little) will be frustrated. Each dispute over a separations rule interpretation might need to be decided by the courts. To avoid this result, questions surrounding the interpretation of the Part 36 rules should be quickly addressed by the Joint Board on Separations.

CONCLUSION

These comments outline some preliminary conclusions and concerns regarding what might be the unanticipated consequences of an exercise of jurisdiction over intrastate services by the FCC. We encourage the FCC to give interested parties an opportunity to comment further on these issues in CC Docket No. 80-286. In summary:

- the FCC has asserted its jurisdiction over dial-up Internet services and, therefore, consideration should be given to an immediate additional allocation of costs associated with these "interstate" services to the interstate jurisdiction via the CC 80-286 Joint Board process;
- the FCC is encouraged to work with the 80-286 Federal-State Joint Board to jointly devise an efficient methodology to issue interpretations on how to apply Part 36 rules when questions arise; and,
- any party, including state commissions, might begin "picking and choosing" by reallocating a portion of the investment and expenses of these "interstate" services to

the interstate jurisdiction by simply reinterpreting some of the Part 36 rules, as has been done and continues to be done. The Joint Board process has not addressed these issues, and prompt action is required.

RESPECTFULLY SUBMITTED

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